

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

**JASON MCLEAN and  
BRIAN COLEMAN,**

**Plaintiffs,**

**v.**

**COMMUNICATIONS CONSTRUCTION  
GROUP, LLC,**

**Defendant.**

**CIVIL ACTION NO. 06-617 (SLR)**

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT  
COMMUNICATIONS CONSTRUCTION GROUP, LLC'S MOTION IN LIMINE**

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Respectfully submitted,

/s/ Daniel M. Silver

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Dated: February 25, 2008

Attorneys for Defendant  
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**I. NATURE AND STAGE OF THE PROCEEDING**

Plaintiff Jason McLean (“Mr. McLean”) and Plaintiff Brian Coleman (“Mr. Coleman”) (collectively “Plaintiffs”) allege claims of racial harassment and discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (“Title VII”), Count I, and retaliation in violation of Title VII, Count II, against Defendant Communications Construction Group, LLC (“Defendant” or “CCG”). Currently pending before the Court are CCG’s motion for summary judgment as to all of Plaintiffs’ claims and Plaintiffs’ partial motion for summary judgment with respect to their racial harassment claim only. Trial in this matter is set to commence on March 31, 2008. As explained more fully in CCG’s motion for summary judgment, Plaintiffs will be unable to point to any admissible evidence at trial necessary to establish their claims of racial discrimination, harassment or retaliation. Therefore, CCG anticipates that Plaintiffs will attempt to introduce inadmissible evidence in an attempt to strengthen their already weak claims. Accordingly, CCG files this motion in limine to preclude Plaintiffs from introducing such inadmissible evidence.

**II. SUMMARY OF ARGUMENT**

1. The May 31, 2005 police report should be excluded from trial because it lacks trustworthiness, contains hearsay statements, and because its’ probative value is substantially outweighed by the danger of unfair prejudice, confusion and delay.

**III. STATEMENT OF FACTS**

On May 31, 2005, a CCG employee told Plaintiffs that during the prior week, he heard another CCG employee, Bradley Dodson, make a comment allegedly referring to Mr. McLean and Mr. Coleman as “niggers.” It is undisputed that Mr. McLean and Mr. Coleman were not present during this conversation and neither Plaintiff actually heard Bradley Dodson make the alleged statement. Rather, Mr. McLean and Mr. Coleman only heard the statement second hand

from another employee who repeated it to them.

After being told about the alleged racial slur, Mr. McLean and Mr. Coleman left the spot where they were working and went to confront Bradley Dodson in another area. Mr. Coleman and Bradley Dodson got into a verbal altercation and Bradley Dodson apparently poked Mr. Coleman in the chest. Mr. Coleman called the police, and when the police arrived they met outside, on the street with various individuals involved in the incident and then sometime later prepared a summary report. (See Police Report, attached as Exhibit A). This report is inaccurate, contains inadmissible hearsay, and includes unduly prejudicial statements.

#### **IV. ARGUMENT**

At this time, Defendant does not know whether Plaintiffs will attempt to call the Police Officers who responded to Mr. Coleman's telephone call on May 31, 2005 as witnesses in the trial of this matter. Plaintiffs may certainly do so. Plaintiffs should not, however, be allowed to simply introduce the report prepared by the Officers because it is an unreliable hearsay statement by the Officers and would not be subject to cross examination.

##### **A. The Court Should Exclude Police Report Because It Is Untrustworthy**

While Defendant acknowledges that under Federal Rule of Evidence 803(8) ("Rule 803(8)") police reports setting forth "factual findings resulting from an investigation made pursuant to authority granted by law" are generally admissible as exempt from the hearsay rule exclusion, such reports are not admissible if the "circumstances indicate lack of trustworthiness." In making the determination of trustworthiness, courts should place emphasis on the reliability of the report. See Racz v. R.T. Merryman Trucking, Inc., Civ.A.No. 92-3404, 1994 WL 124857 (E.D.Pa. April 4, 1994) (excluding a police report as unreliable and thus "untrustworthy" under Rule 803(8)). Here, there are a number of concerns regarding the accuracy of the report. Indeed, Mr. McLean himself admitted in his deposition testimony that the May 31, 2005 police report

contained significant inaccuracies.

Q. Okay. Have you reviewed the police report that is attached to the complaint in this action?

A. Yes

\* \* \*

Q. It also says that you are a White male, age 46. How old are you?

A. 23.

Q. And you are not a White male?

A. Half.

Q. If you were to be asked by the police your race, would you say White?

A. And black.

Q. So you would agree this report is not entirely accurate?

A. I would agree.

Exhibit B [McLean Dep.] at 21:17-19; 22:20-23:6). The fact that the police report does not get the age or race of the Plaintiff correct demonstrates its untrustworthiness.

**B. The Court Should Exclude Police Report Because It Contains Double Hearsay**

The police report should also be excluded because it contains inadmissible double hearsay. To the extent that a police report contains statements that are attributable to persons other than the reporting officer, such statements constitute inadmissible hearsay and are not covered by Rule 803(8)'s hearsay exemption. See McShain v. Cessna Aircraft Co., 563 F.2d 632, 636 (3rd Cir. 1977); see also U.S. v. Taylor, 462 F.3d 1023, 1026 (8th Cir. 2006) (finding a police report inadmissible that contained a recitation of the witnesses statements to police). Thus, police reports containing statements of others are regarded as "unreliable" because such reports "reflect the statements of third parties who have not duty to report and whose reliability cannot be tested." Krepps v. Gov't of the Virgin Islands, No. CRIM.A. 1999/0047, 2006 WL 1149216, \*6 (D.V.I. April 13, 2006) (excluding a police report in part due to hearsay statements). In this case, the report purports to contain an extensive statement of Bradley Dodson. This statement constitutes inadmissible hearsay.

**C. The Court Should Exclude Police Report Because It Is Unduly Prejudicial**

As a final strike against it, the police report should also be excluded under Federal Rule of Evidence 403 (“Rule 403”). Rule 403 provides that otherwise relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Here, the police report makes several references to the May 31, 2005 incident as a possible “hate crime.” However, there is no record evidence that Bradley Dodson was ever charged with a hate crime stemming from the incident. The term “hate crime” has a highly negative connotation and would cause an emotional impact on jury members. Thus, admission of the police report would be highly prejudicial to CCG as a jury trial has been demanded in this case, and a jury may give undue weight to such a statement in a report written by a police officer.

Moreover, the police report has a very low probative value. The report is wholly duplicative of information and admissible evidence that can be presented at trial. The police officers themselves witnessed no events or occurrences and have no first hand knowledge. The report includes only hearsay statements and conclusions from witnesses. The majority of individuals interviewed by the police as witnesses were deposed in this matter. And as to those witnesses who were not deposed, Plaintiffs made no effort to depose them and have not otherwise shown that they were unable to depose any of those witnesses.

Therefore, the police report should be excluded because the reference to a hate crime would be highly prejudicial to CCG, and this prejudice outweighs the probative value of the report under Rule 403 as Plaintiffs can obtain the evidence contained in the police report by other means. See, e.g., Cambra v. The Restaurant School, Civ.A.No. 04-2688, 2005 WL 2886220, \*5 (E.D. Pa. Nov. 2, 2005) (excluding evidence under Rule 403 where the evidence had low a

probative value that was substantially outweighed by the danger of unfair prejudice).

**V. CONCLUSION**

For the reasons set forth above, Defendant respectfully requests that the Court enter an Order granting its Motion in Limine and excluding the evidence referenced above.

Respectfully submitted,

/s/ Daniel M. Silver

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Dated: February 25, 2008

Attorneys for Defendant  
Communications Construction Group, LLC

**CERTIFICATE OF SERVICE**

I, Daniel M. Silver, hereby certify that a true and correct copy of the foregoing Defendant Communications Construction Group, LLC's Memorandum of Law in Support of its Motion in Limine and all Exhibits thereto, has been served via CM/ECF this 25th day of February, 2008 upon the following:

Ronald G. Poliquin  
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Attorney for Plaintiffs

/s/ Daniel M. Silver

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Daniel M. Silver (DE Bar ID # 4758)

# **EXHIBIT A**

Page: 1	Report Date: 05/31/2005	Agency: New Castle County PD	Complaint: 32-05-066101
Reported Date and Time TUE 05/31/2005 1535		Initial Crime Report	
Occured: TUE 05/31/2005 1411 thru TUE 05/31/2005 1412			
Location: cunane CIR forest ridge Newark, DE 19702 AT ENTRE LANE			
M.O. and Incident Overview: Victim reported that Suspect pointed his finger at Victim and poked him in the chest with his fingers during an argument over a racial epithet made by Suspect last week.			
Grid 050-330	Sector 34	County New Castle	Domestic Related <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
4-F-14 Sent? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Gen Broadcast Sent? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

## Victim Information

Victim Number 001	Name COLEMAN, BRIAN T		
Type Individual	Sex Male	Race Black	Ethnic Origin Non-Hispanic
Age 32	D.O.B. [REDACTED]/1972		
Address 20 tarpon CT WILLINGBORO, NJ 08046	Resident Status Full Time	Home Telephone (609) 871-3763	Employer/School COMMUNICATIONS CONSTRUCTION GR
Work Telephone (302) 322-7972			
Reporting Person? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Victim Injured? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Victim Deceased? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Officer Comments
Injuries		Description of Injuries	

## Suspect/Defendant Information

Sequence 001	Type Suspect	SOI Number	Name DODSON, BRADLEY		Nick Name
Sex Male	Race White	Ethnic Origin Non-Hispanic	Age 33	D.O.B. [REDACTED]/1971	Height 6' 03"
Weight 210	Skin Tone	Eye Color Blue			
Hair Color Brown	Hair Length	Hair Style	Facial Hair	Voice Speech	Teeth
Build	Glasses				
Disguise	Disguise Color(s)	Resident Status Full Time	Unusual Characteristics	Armed With Unarmed	
Address 1021 puzzletown RD DUNCANSVILLE, PA 16635	Home Telephone (302) 322-7972	Employer/School COMMUNICATIONS CONSTRUCTION GRP 700 LARKINS ST New Castle, DE 19720	Work Telephone (302) 322-7972		
Arrest Number	Suspect's Clothing Description				

## Crimes and Associated Information

Victim Number 001	Crime Seq 001	Statute DE:11:0602:000A:M:	Crime Description Menacing
Location Of Offense Construction Site		Status No Victim cooperation 05/31/2005	Involvement <input type="checkbox"/> Alcohol <input type="checkbox"/> Drugs <input type="checkbox"/> Computer
General Offense			
Suspected Hate/Bias <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No - N/A	Hate Bias Type Anti Black	Crime Code 13164E - Intimidation/Reckless Endanger/Terroristic Threat/Harassment/Other Assaults/Non-Aggravated	
Burglary Force Involved <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Weapon/Force Used Personal Weapons/Hands/Feet		
Victim Number 001	Crime Seq 002	Statute DE:11:0601:0001:M:	Crime Description Offensive Touching
Location Of Offense Construction Site		Status No Victim cooperation 05/31/2005	Involvement <input type="checkbox"/> Alcohol <input type="checkbox"/> Drugs <input type="checkbox"/> Computer
General Offense			
Suspected Hate/Bias <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No - N/A	Crime Code 13134E - Offensive Touching/Other Assaults/Non-Aggravated		
Burglary Force Involved <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Weapon/Force Used Personal Weapons/Hands/Feet		
M.O. Information	MO Class Suspect's General Actions	MO Description POINTED FINGER	
	MO Class Type of Weapon Used	MO Description HANDS	

## Victim - Suspect/Defendant Relationships

Victim - 001 COLEMAN, BRIAN T	Suspect/Defendant - 001 DODSON, BRADLEY	Victim Offender Relationship Otherwise Known
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## Witness Information

Sequence 001	Type Witness	Name MCLEAN, JOSEPH G	Sex Male	Race White	Age 46	D.O.B. [REDACTED]/1958
Address P.O. box 78 MADERA, PA 16661	Home Telephone (814) 378-5436	Employer/School COMMUNICATIONS CONSTRUCTION GR	Work Telephone			
Sequence 003	Type Witness	Name KOCH, MICHAEL B	Sex Male	Race White	Age 36	D.O.B. [REDACTED]/1968
Reporting Officer OFC MEYER - 2582 2	Supervisor Approval EUGENE J MCKENNA OJNCEJM Date 05/31/2005 1822					

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Sequence  
003 Continued

## Witness Information

Address 219 wallingford AVE WALLINGFORD, PA 19086		Home Telephone (484) 368-1498	Employer/School COMMUNICATIONS CONST GROUP	Work Telephone
Sequence 005	Type Witness	Name KRAKOWSKI, FRANK	Sex Male	Race White
Address rd 1 box 229 ROARING SPRING, PA 16673		Home Telephone (814) 224-2197	Employer/School COMMUNICATIONS CONST GROUP	Age 46
				D.O.B. 09/1958

## Investigative Narrative

On the above date and time I responded to the above location in reference to a possible hate crime incident. Ofc. Falkenburg responded as well and was able to interview the Victim in the incident as well as some of the witnesses. I made contact with the suspect obtaining his account of what had transpired and then met with Ofc. Falkenburg to brief same. I spoke briefly with Victim who had expressed concern over what transpired. I also spoke briefly with W-1 (Koch) who corroborated Victims account with respect to being present when Suspect made the racial statement. Due to the nature of this incident I made contact with Sgt. Gregory advising him of what we had learned which was that a racial slur was made by Suspect towards Victim last week (believed to be on Friday). Victim was advised of what had been said by Suspect and upon hearing same went to speak with Suspect about the matter. Victim had apparently just learned of the statement made by Suspect today's date as the witnesses to same did not say anything on Friday. Victim had concerns over going to the manager as the manager for the site is the suspects' brother. Victim advised that the incident turned into an argument and that Suspect had poked him in the chest. I contacted Deputy AG S. Walther and briefed him on what had transpired and the concerns. I was advised that the matter based upon the offense was a misdemeanor offensive touching not in our presence and therefore Victim could be given a copy to sign warrants. Deputy AG Walther advised that the hate crime status would amplify the charges from unclassified misdemeanor to a class A misdemeanor and was not an actual separate offense believing that there was a flag that could be checked to document same. Based upon the interviews conducted by Officer Falkenburg and myself one offense of menacing was added to this complaint. I made contact with Sgt. Gregory advising him of the conversation with Dep. AG Walther at which time he contacted Lt. McGowan briefing him on same. I made contact with Pc Fender who is the site manager and educated him on future issues as well as the actions we would be taking today's date. Victim was provided with the complaint information and referred to Jp court to sign warrants. Based upon the investigation it was learned that this incident stemmed from a statement made by Suspect last week which was racial in nature therefore making same a potential hate crime and documented as such. No further action taken by this officer reference this incident at this time. For additional refer to Officer Falkenburg's supplement as interviews were conducted by same and the exact nature of the statement was relayed to him and then told to me.

## Statement of Suspect 001 - BRADLEY DODSON

Bradley advised that Brian and Jason approached him while he was on the hill drilling. He advised that some guy told them that he called them a nigger. He advised that he supposedly said it last week. (He did not admit or deny making the statement at this time). He advised that they first went to Frank and then to him. He advised that they were yelling at him asking him what he said and claimed that Brian was in his face screaming. He advised that he told them he did not know what they were talking about and called a supervisor at which time he was shaking his finger. He claimed that Brian told him not to point at him however he did so at which time Brian approached him still upset. He advised that he poked Brian in the chest 2-3 times with his fingers at which time Brian poked him back claiming that he should not have done same. He detailed the incident a little better advising that he was up on the hill drilling when Brian came up on a Kubota. He advised that they started yelling at Frank about what they were saying calling them Niggers. He advised that he had no idea what they were talking about and then got on the phone calling Dave (Manager to come over right away. He called Mike the field supervisor and while he was doing so Brian was in front of him with Jason there as well. Brian was making some kind of statement in reference to his hands being lethal. Brian told him not to point his finger at him, however he continued to do so at which point Mike came at him. He poked Brian in the chest with his fingers 2-3 times in the chest adding that he probably should not have done that, however Brian then poked him back.

Reporting Officer  
OFC MEYER - 2582 2Supervisor Approval  
EUGENE J MCKENNA OJNCEJM Date 05/31/2005 1822

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## Statement of Suspect 001 - BRADLEY DODSON - Continued

He understood that warrants could be signed for his arrest by Victim and that there were subjects present who heard him make the statement.

Reporting Officer OFC MEYER - 2582 2		Supervisor Approval EUGENE J MCKENNA OJNCEJM Date 05/31/2005 1822	
Detective Notified		Referred To	
Solvability Factors	<input type="checkbox"/> Witness <input type="checkbox"/> Suspect Located	<input type="checkbox"/> M O <input type="checkbox"/> Suspect Described	<input type="checkbox"/> Trace Stolen Property <input type="checkbox"/> Suspect Identified <input type="checkbox"/> Suspect Vehicle Identified
			Status Has Follow Up

# **EXHIBIT B**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

JASON McLEAN and )  
BRIAN COLEMAN, )  
 ) C.A. No. 06-617 SLR  
Plaintiffs, )  
 )  
-vs- )  
 )  
COMMUNICATIONS CONSTRUCTION )  
GROUP, LLC, )  
 )  
Defendant. )

Deposition of JASON McLEAN taken pursuant  
to notice at the law offices of Young, Malmberg &  
Howard, 30 The Green, Dover, Delaware, beginning at 9:13  
a.m. on September 13, 2007, before Julianne LaBadia,  
Registered Diplomate Reporter and Notary Public.

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ORIGINAL

1 A. No.

2 Q. He wasn't present at the time that you  
3 initially spoke with Mr. Dodson?

4 A. No.

5 Q. When did he arrive?

6 A. After his brother called.

7 Q. Did you speak with Dave Dodson?

8 A. No.

9 Q. Did you speak with Mike Fender?

10 A. Yes.

11 Q. And what did you say to Mr. Fender?

12 A. I don't recall exactly what I said.

13 Q. You spoke with the police?

14 A. Yes.

15 Q. You made a statement to them?

16 A. Yes.

17 Q. Okay. Have you reviewed the police report that  
18 was attached to the complaint in this action?

19 A. Yes.

20 Q. Do you believe that it's accurate?

21 A. Yes.

22 Q. In the police report, it lists your address as  
23 Willingboro, New Jersey. Was that your address at that  
24 point in time?



1 A. No.

2 Q. Do you know why this lists your address as  
3 Willingboro, New Jersey?

4 A. No idea.

5 Q. Is that what you told the police?

6 A. No.

7 Q. So then this report isn't entirely accurate, is  
8 it?

9 A. Not if that's my address on there.

10 Q. I'm sorry. Let me just say that that was  
11 incorrect. I'm thinking of Mr. Coleman's address. This  
12 lists your address as Madera, PA, Box 78. Do you know  
13 what address that is?

14 A. No idea.

15 Q. It's a location west of Harrisburg. Have you  
16 ever lived there?

17 A. No. I believe Robert Koch or Joseph Tatsch  
18 lives in that area. I think they might have mixed up the  
19 addresses.

20 Q. It also says that you are a White male, age 46.  
21 How old are you?

22 A. 23.

23 Q. And you are not a White male?

24 A. Half.



1 Q. If you were to be asked by the police your  
2 race, would you say White?

3 A. And Black.

4 Q. So you would agree this report is not entirely  
5 accurate?

6 A. I would agree.

7 Q. You said that after the police took statements,  
8 everyone went home for the day?

9 A. In my recollection, yes.

10 Q. And that was at the direction of Mr. Fender?

11 A. Yeah.

12 Q. What happened after May 31?

13 A. Continued to work.

14 Q. Did you work on that same crew?

15 A. No.

16 Q. To whose crew did you go?

17 A. That day after, nobody's.

18 Q. And why not?

19 A. I don't know.

20 Q. Did you want to go back to Mr. Dodson's crew?

21 A. I wouldn't have had a problem with it.

22 Q. Who told you not to go back to that crew?

23 A. Mike Fender.

24 Q. And what did you do the day after?

